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IAFF Local 230
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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA CLARA
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11

12 CITY OF SAN JOSE,

13 Petitioner,

14 vs.

15 INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL UNION 230,
16 ROBERT SAPIEN, PRESIDENT, AND
DOES 1-10,

17 Respondents.
18

19 INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL UNION 230,

20 Cross-Petitioner,

21 vs.
22

23 CITY OF SAN JOSE,

24 Cross-Respondent.
25

Case No. 112CV237635

**ANSWER TO AMENDED VERIFIED
PETITION FOR WRIT OF MANDATE AND
PETITION TO COMPEL ARBITRATION BY
RESPONDENT INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS,
LOCAL UNION 230 AND CROSS-
PETITION FOR WRIT OF MANDATE,
PROHIBITION OR OTHER APPROPRIATE
WRIT RELIEF**

26 Respondent International Association of Firefighters, Local Union 230 (Union)
27 hereby answers the Amended Verified Petition for Writ of Mandate and Petition to Compel
28 Arbitration as follows:

1 1. Respondent admits the allegation in the first sentence of Paragraph No. 1,
2 but denies that the court has jurisdiction over Petitioner's writ action by virtue of California
3 Code of Civil Procedure Section 1085 because of a defective verification.

4 2. Respondent admits the allegation of Paragraph No. 2, but denies that venue
5 is proper on Petitioner's writ action pursuant to Code of Civil Procedure Section 1085.

6 3. Respondent admits the allegations of Paragraph No. 3.

7 4. Respondent admits the allegations of Paragraph No. 4.

8 5. Respondent admits the allegations of Paragraph No. 5.

9 6. Respondent admits the allegations of Paragraph No. 6, but alleges that
10 pursuant to the purported lawful adoption of Measure B by San Jose voters in the June 5,
11 2012 election, San Jose Charter Section 1504-A was enacted stating as follows:

12 The voters expressly reserve the right to consider any change
13 in matters related to pension and other post-employment
14 benefits. Neither the City Council, nor any arbitrator appointed
15 pursuant to Charter Section 1111, shall have authority to agree
16 to or provide any increase in pension and/or retiree health care
benefits without voter approval, except that the Council shall
have the authority to adopt Tier 2 pension benefit plans within
the limits set forth herein.

17 7. Respondent admits the allegations of Paragraph No. 7, and alleges that the
18 Petitioner City of San Jose (City) re-engaged in bargaining on and after October 31, 2011
19 thus breaking any stipulated impasse over the issue of second tier retirement benefits for
20 new employees.

21 8. Respondent admits the allegation of Paragraph No. 8 that on or about May
22 24, 2011, the San Jose City Council (Council) adopted the City Manager's "Fiscal Reform
23 Plan," dated May 2, 2011. Respondent denies each and every other allegation of
24 Paragraph No. 8.

25 9. Respondent admits the allegations of Paragraph No. 9.

26 10. Respondent lacks sufficient information to admit or deny the allegations of
27 Paragraph No. 10, and on that basis denies the allegations.

28 ///

1 11. Respondent denies the allegations of Paragraph No. 11 that the City
2 proposed retirement reforms that would be implemented through a ballot measure and
3 reforms that would be implemented without a ballot measure. Respondent alleges that the
4 City concentrated its bargaining on ballot measure issues and not on non-ballot retirement
5 issues concurrently at a single table.

6 12. Respondent admits the allegations of Paragraph No. 12.

7 13. Respondent admits that negotiations between the Union and the City
8 occurred in June, 2011, but otherwise denies the allegations of Paragraph 13. Respondent
9 alleges those negotiations were focused on a proposed ballot measure and that
10 subsequent negotiation meetings focused only on various City-written ballot measure
11 proposals. Respondent alleges that the City proposed only ballot measures as a means of
12 capping or limiting non-ballot measure proposals for second-tier benefits to no more than
13 those otherwise provided for under the City-proposed ballot measure.

14 14. Respondent admits the allegation of Paragraph No. 14 that the parties
15 agreed to ground rules in negotiations known as the "Framework", but denies the
16 remaining allegations.

17 15. Respondent denies the allegations of Paragraph No. 15 that the parties
18 "agreed" to conclude negotiations on October 31, 2011, but admits the remaining
19 allegations of Paragraph No. 15.

20 16. Respondent admits the allegations of Paragraph No. 16, that negotiations
21 occurred on or about the dates stated, but alleges that discussions on those dates focused
22 only upon a City-proposed ballot measure.

23 17. Respondent admits the allegations of Paragraph No. 17, but alleges that
24 Respondent was not offered the opportunity to negotiate over the provisions of the City's
25 proposed ballot measure dated February 8 and 21, 2012. Respondent alleges that on
26 February 10, 2012, City proffered a proposed ballot measure dated February 8, 2012 with
27 the specific condition that rejection of the proposal would result in the City placing on the
28 June 2012 election ballot the ballot measure adopted by the Council on December 6, 2011.

1 Respondent rejected the February 8, 2012 proposed ballot measure. On February 21,
2 2012, the City changed its position and informed Respondent that the February 8, 2012
3 offer would go to the Council for adoption and displace the provisions by Council-
4 authorized ballot measure from December, 2011. Based on this new shifted position from
5 February 10, 2012, Respondent then demanded bargaining over the February 8th proposed
6 ballot measure. The City rejected this demand. On or about June 4, 2012, Respondent filed
7 an unfair practice charge with the California Public Employment Relations Board ("PERB")
8 Charge #SF-CE-969-M seeking a determination under the Meyers-Milias-Brown Act
9 (MMBA)(Govt. Code §§3500, *et seq.*) and the decision in *The People ex rel. Seal Beach*
10 *Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591. A true and correct copy
11 of the charge, without exhibits, is attached as Exhibit 1. PERB has not yet acted on the
12 charge.

13 18. Respondent denies the allegation of Paragraph No. 18 that the parties
14 reached an impasse on both a ballot measure and second tier retirement benefits on
15 October 31, 2011.

16 19. Respondent admits the allegations of Paragraph No. 19 that mediation
17 occurred in November, 2011, but otherwise denies the allegations in Paragraph No. 19.

18 20. Respondent does not have sufficient information to admit or deny the allega-
19 tions of Paragraph No. 20 and on that basis denies the allegations.

20 21. Respondent admits the City Council took action on December 6, 2011 to
21 delay the date of the election from March 15 to June 5, 2012, and alleges that the Council
22 directed staff to re-commence negotiations over a proposed ballot measure with labor
23 organizations, including with Respondent.

24 22. Respondent admits that renewed bargaining did not result in an agreement
25 over a ballot measure, but otherwise denies the allegations of Paragraph No. 22.

26 23. Respondent admits that mediation negotiations between the parties occurred
27 in January and February, 2012, but denies that such mediation covered more than the
28 City's proposed ballot measure and on that basis denies the remaining allegations in

1 Paragraph No. 23.

2 24. Respondent denies the allegation of Paragraph No. 24 that the City "made
3 several concessions in mediation with respect to the terms of the ballot measure," but
4 Respondent admits that the City proposed at the conclusion of mediation in February 2012
5 that Respondent could accept the City's proposed February 8, 2012 ballot measure
6 proposal but, if rejected, the City stated that the ballot measure proposal adopted by the
7 City Council on December 6, 2011 for the June 5, 2012 election would proceed
8 unchanged. Respondent alleges it rejected the City's ballot measure proposal dated
9 February 8, 2012, but the City later informed Respondent that it would not proceed with the
10 Council-approved ballot measure from December 6, 2011 and instead the Council would
11 substitute and approve the ballot measure dated February 8, 2012 as the measure to go
12 forward on the June, 2012 election ballot as "Measure B".

13 25. Respondent admits the allegations of Paragraph No. 25.

14 26. Respondent admits the allegations of Paragraph No. 26.

15 27. Respondent admits the allegations of Paragraph No. 27.

16 28. Respondent admits that Measure B requires the creation of a second tier of
17 benefits, but denies that Measure B limits benefits available in this second tier as alleged in
18 Paragraph No. 28. Rather, Measure B, permits the negotiation or provision of benefits for
19 second tier employers above those otherwise provided by Measure B subject to voter
20 approval.

21 29. Respondent admits the allegations of Paragraph No. 29.

22 30. Respondent admits the allegations of Paragraph No. 30, but alleges that the
23 power of the Superior Court of the County of Santa Clara to appoint an arbitrator who shall
24 be a retired judge of the Superior Court must be exercised pursuant to and consistent with
25 Code of Civil Procedure Section 1281.6.

26 31. Respondent denies the allegations of Paragraph No. 31 that the City provided
27 the Union with "numerous proposals on second tier benefits, and alleged that the proposals
28 provided by the City to the Union focused most on a proposed charter amendment" and

1 that the City's final proposal conforms "to the maximum benefit under Measure B".

2 32. Respondent admits the allegations under Paragraph No. 32 that under
3 Section 1111 impasse can be declared by either party, but denies the allegations that
4 impasse existed over second tier retirement issues after October 31, 2011.

5 33. Respondent admits the allegations under Paragraph No. 33 that the parties
6 proceeded to two rounds of mediation after October 31, 2011. Respondent denies,
7 however, that pursuant to Section 1111, either party may now invoke interest arbitration to
8 resolve the impasse procedure because the legality of Measure B is subject to PERB's
9 initial exclusive jurisdiction and to related litigation in the matter of *San Jose Retired*
10 *Employees, et al. v. City of San Jose, etc.*, Santa Clara Superior Court Case No. 112-CV-
11 233660.

12 34. Respondent admits the allegations of Paragraph No. 34.

13 35. Respondent admits the allegations of Paragraph No. 35.

14 36. Respondent admits the allegations of Paragraph No. 36.

15 37. Respondent admits the allegations of Paragraph No. 37, but denies that at a
16 meeting on or about October 1, 2012, counsel for Local 230 said that Local 230 would not
17 agree to name a neutral arbitrator or to proceed to interest arbitration.

18 38. Respondent admits the allegations of Paragraph No. 38.

19 39. Respondent denies the allegations of Paragraph No. 39 and alleges that it
20 has identified prospective retired Superior Court Judges to serve as a neutral arbitrator
21 pursuant to Section 1111.

22 40. Respondent denies the allegations of Paragraph No. 40 on the grounds that
23 the pending PERB charge filed by Respondent requires a stay of any ministerial duty
24 Respondent may have.

25 41. Respondent denies the allegations of Paragraph No. 41.

26 42. Respondent denies the allegations of Paragraph No. 42.

27 43. Respondent denies the allegations of Paragraph No. 43.

28 44. Respondent denies the allegations of Paragraph No. 44.

1 WHEREFORE, answering Respondent prays for judgment as hereinafter set forth.

2 **AFFIRMATIVE DEFENSES**

3 Respondent hereby asserts the following affirmative defenses:

4 **FIRST AFFIRMATIVE DEFENSE**
5 **(Defective Verification)**

6 The verification for the Petition for Writ is defective because it does not set forth a
7 basis for personal knowledge by the signator of the facts alleged in the Petition and
8 because extenuating circumstances have not been alleged under Code of Civil Procedure,
9 Section 446 excusing verification by the beneficially interested party—the City of San Jose.

10 **SECOND AFFIRMATIVE DEFENSE**
11 **(Failure To State A Cause Of Action)**

12 Each and every cause of action asserted in the Petition on file herein fails to state
13 facts sufficient to constitute any cause of action upon which relief may be granted.

14 **THIRD AFFIRMATIVE DEFENSE**
15 **(Laches)**

16 Each and every cause of action asserted in the Petition on file herein is barred by
17 the doctrine of laches.

18 **FOURTH AFFIRMATIVE DEFENSE**
19 **(Lack Of Subject Matter Jurisdiction)**

20 As to each and every cause of action asserted in the Petition, the court lacks subject
21 matter jurisdiction since the legality of the enactment of Measure B giving rise to second
22 tier negotiations at issue in this Petition is subject to an unfair practice charge before the
23 California Public Employment Relations Board in Case No. SF-CE-969-M.

24 **FIFTH AFFIRMATIVE DEFENSE**
25 **(Unclean Hands)**

26 Respondent alleges that Petitioner is precluded from maintaining any cause of
27 action against Respondent under the doctrine of unclean hands.
28

**CROSS-PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER
APPROPRIATE WRIT RELIEF**

1 1. Respondent and Cross-Petitioner Union is the exclusive bargaining
2
3 representative for firefighters employed by Petitioner and Cross-Respondent City pursuant
4 to the MMBA.
5

6 2. Since at least mid-2011, the Union has been in negotiations with the City over
7 the establishment of pension benefits for employees hired subsequent to the enactment of
8 Measure B. The City has declared an impasse in those negotiations, even though the
9 City's bargaining proposals have been constructed only in the form of proposed
10 amendments to the City Charter.

11 3. In bargaining, the Union has proposed that second-tier benefits either be
12 provided to employees per a contract with the California Public Employees' Retirement
13 System (CalPERS) or at a level of benefits consistent with those provided to firefighters
14 hired on and after January 1, 2013 in jurisdictions contracting for benefits through either the
15 County Employees Retirement Law of 1937 or the California Public Employees' Retirement
16 System as established by the California Public Employees' Pension Reform Act of 2012
17 (PEPRA), Stats. 2012, ch. 296. The reason for the Union's proposal is to ensure that the
18 City of San Jose is not placed at an economic or competitive disadvantage by providing
19 retirement benefits less than those statutorily in place for the vast bulk of firefighters
20 employed by municipal departments and special districts throughout the Bay Area and the
21 State of California. Measure B creates a 2% at age 60 benefit for prospective San Jose
22 Firefighters with a 1.5% cost of living adjustment post retirement. Measure B caps the total
23 benefit at 65% of employee's compensation. In contrast, under the PEPRA, firefighters first
24 employed on and after January 1, 2013 will receive a pension benefit no less than a 2% at
25 age 57 benefit with a 2% annual cost of living adjustment post retirement. Absent change,
26 the retirement benefits provided for prospective firefighters under Measure B are inferior to
27 those minimally required under the PEPRA.

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4. The City has refused to agree that the Union's proposal is cognizable pursuant to the interest arbitration impasse procedures provided for under San Jose City Charter Section 1111 and Section 1504-A.

5. Pursuant to San Jose City Charter Sections 1111 and 1504-A, the City has a mandatory ministerial duty to permit submission of the Union's proposal for second-tier retirement benefits to the interest arbitration impasse resolution process. The Union has clear, present and beneficial interest in the City's compliance with the City Charter.

6. The Union has no plain, speedy or adequate remedy in the normal course of law.

7. Despite the Union's request for submission of its proposals to the interest arbitration dispute panel, the City has continuously refused to acknowledge that the panel has the authority to entertain such proposals.

8. The Union has the immediate right to the City's compliance with the provisions of the San Jose City Charter enforceable through Code of Civil Procedure Section 1085.

PRAYER FOR RELIEF

WHEREFORE, Respondent and Cross-Petitioner prays as follows:

1. That the court deny the Petitioner's request for a Peremptory Writ of Mandate and Petition to Compel Arbitration.

2. That the court grant Respondent and Cross-Petitioner's request for a stay of these proceedings until resolution by PERB of the charge in Case No. SF-CE-969-M, or in the alternative, grant Respondent and Cross-Petitioner's Cross-Petition for a Peremptory Writ of Mandate ordering arbitration inclusive of all proposals made by Respondent and Cross-Petitioner regarding Tier 2 benefits.

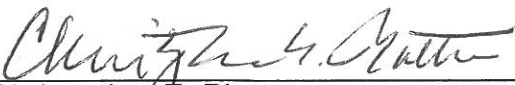
3. That the court award Respondent and Cross-Petitioner costs of suit and reasonable attorney fees.

1 4. That the court award Respondent and Cross-Petitioner other and further relief
2 as it deems just and proper.

3
4 Dated: February 18, 2013

WYLIE, McBRIDE, PLATTEN & RENNER

5
6 By:


Christopher E. Platten
Attorney for Respondent and
Cross-Petitioner International Association
of Firefighters, Local Union 230

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VERIFICATION

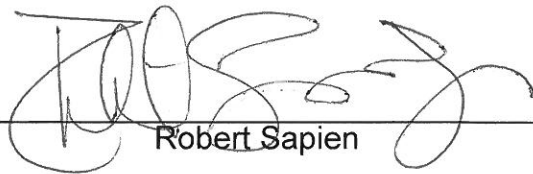
I, Robert Sapien, state as follows:

1. I am the President of International Association of Firefighters Local 230 (Union) in the above-entitled action, and am authorized to verify this document in that capacity. I am the chief spokesperson in negotiations between the Union and the City of San Jose concerning retirement benefits. I have been present and participated in their negotiations with representatives of the City since mid-2011 through the present.

2. I have read the foregoing ANSWER TO AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND PETITION TO COMPEL ARBITRATION BY RESPONDENT INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL UNION 230 AND CROSS-PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT RELIEF and based on my participation in negotiations on behalf of the Union with the City, I know the contents thereof. The information contained herein is true of my own knowledge, except as to those matters which are therein stated upon information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 18 day of February 2013 at San Jose, California.



Robert Sapien

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PROOF OF SERVICE
(C.C.P. §§ 1013(3) & 1011)
(REVISED 1/1/88)

I declare:

That I am now and at all times herein mentioned a citizen of the United States and a resident of Santa Clara County, California. I am over the age of eighteen years and not a party to the within action. My business address is 2125 Canoas Garden Avenue Suite 120, San Jose, CA 95125. On the date below I served the

ANSWER TO AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND PETITION TO COMPEL ARBITRATION BY RESPONDENT INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL UNION 230 AND CROSS-PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT RELIEF

X By Mail: by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at San Jose, Santa Clara County, California, addressed as set forth below. I am readily familiar with my firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Overnight Mail: by placing a true copy thereof, enclosed in a sealed U.P.S. overnight-mail envelope with our firm's account number picked up by U.P.S. at our office in San Jose, California addressed as set forth below.

X By e-mail: I personally sent to the addressee's e-mail address a true copy of the above-described document(s).

*Attorney for City of
San Jose*

Jonathan V. Holtzman, Esq.
David Kahn, Esq.
RENNE SLOAN HOLTZMAN SAKAI LLP
350 Sansome Street Suite 300
San Francisco, CA 94104
E-mail: dkahn@publiclawgroup.com

*Facsimile:
415.678.3838*

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 19, 2013, at San Jose, California.



LINDA M. TODD

**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD
UNFAIR PRACTICE CHARGE**

RECEIVED
P.E.R.B.
SF REGIONAL OFFICE

DO NOT WRITE IN THIS SPACE:

Case No.

89 CG 969-M

Date Filed:

2012 JUN -7 AM 10:40
06/06/2012

INSTRUCTIONS: File the original and two copies of this charge form with proof of service attached to each copy in the appropriate PERB regional office (see PERB regulation 32075). Proper filing includes concurrent service and proof of service of the charge as required by PERB regulation 32615(c). All forms are available from the regional offices or PERB's website at www.perb.ca.gov. If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE?

YES ☐

No ☒

1. CHARGING PARTY: EMPLOYEE ☐ EMPLOYEE ORGANIZATION ☒ EMPLOYER ☐

- a. Full name: INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 230
- b. Mailing address: 425 East Santa Clara Street, San Jose, CA 95113
- c. Telephone number: (408) 283-0910
- d. Name, title and telephone number
of person filing charge: Christopher E. Platten, Counsel to Charging Party
Wylie, McBride, Platten & Renner
(408) 979-2920
- e. Bargaining unit(s) involved: INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 230

2. CHARGE FILED AGAINST: (mark one only)

EMPLOYEE ORGANIZATION ☐

EMPLOYER ☒

Full name: CITY OF SAN JOSE

- b. Mailing address: 200 East Santa Clara Street, San Jose, CA 95113
- c. Telephone number: (408) 535-1900
- d. Name, title and telephone number
of agent to contact: Alex Gurza, Deputy City Manager
City of San Jose
(408) 535-8155

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization)

- a. Full name:
- b. Mailing address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Government Code section 18524)

- a. Full name:
- b. Mailing address:
- c. Agent

COPY

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?

YES ☒

NO ☐

6. STATEMENT OF CHARGE

- a. The charging party hereby alleges that the above named respondent is under the jurisdiction of (check one)
- ☐ Educational Employment Relations Act (Gov. Code sec. 3540 et. seq.)
 - ☐ Ralph C. Dills Act (Gov. Code sec. 3512 et. seq.)
 - ☐ Higher Education Employer-Employee Relations Act (Gov. Code sec. 3560 et seq.)
 - ☒ Meyers-Milias Brown Act (Gov. Code sec. 3500 et. seq.)
- b. The specific Government Code section(s) alleged to have been violated is/are: Gov. Code §3504.5, 3505, 3506.5(c), 3507(e)(5).
- c. The specific PERB regulation(s) and/or, for MMBA, the specific applicable local rule(s) alleged to have been violated is/are (*a copy of the applicable rule(s) MUST be attached to the charge*) PERB Regs 32603(b), (c), (e), and (f); City of San Jose Resolution 39637
- d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and *not a conclusion of law*. A statement of the remedy sought must also be provided. (*Use and attach additional sheets of paper if necessary.*)

**SEE DECLARATION OF CHRISTOPHER E. PLATTEN IN SUPPORT OF
UNFAIR PRACTICE CHARGE AND REQUEST FOR EXPEDITED HEARING**

DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge and belief and that this declaration was executed on

June 4, 2012
(Date)

at San Jose, California
(City and State)

CHRISTOPHER E. PLATTEN, ESQ.

(Type or Print Name)


(Signature)

Title, if any Attorney

Mailing address: Wylie, McBride, Platten & Renner
2125 Canoas Garden Ave #120
San Jose, CA 95125

Telephone Number (408) 979-2920

Declaration of Christopher E. Platten In Support of Unfair Practice Charge and Request for Expedited Hearing

I, Christopher E. Platten, declare:

1. I am an attorney licensed to practice in the state of California and a shareholder in the firm of Wylie, McBride, Platten and Renner, counsel to Charging Party International Association of Fire Fighters, Local 230 (Union). As counsel, I represent the Union's negotiating team and I participated in the bargaining process at issue. This declaration is made on behalf of the Union in compliance with the requirements of PERB Regulations 32615.

Introduction

2. Under the decision in *The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, a charter city must bargain in good faith before submitting to voters charter amendments relating to items with the scope of representation under Sections 3504.5 and 3505 of the Meyers-Milias-Brown Act (MMBA). As a charter city, Respondent City of San Jose (City) is therefore required to either bargain in good faith to agreement or impasse before placing on the ballot a measure affecting retirement benefits for employees. (*Santa Clara County Correctional Peace Officers' Association* (2010) PERB Decision No. 2114-M; and *Santa Clara County Registered Nurses Professional Association* (2010) PERB Decision No. 2120-M). When a charter city fails to fulfill its obligations to permit bargaining over a proposed charter amendment impacting matters within the scope and representation, it is guilty of bad faith bargaining, and if enacted, the charter amendment is invalid. (*The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra.*)

3. On March 6, 2012, the City Council adopted Resolution No. 76158 and authorized a proposed charter amendment measure to be placed on the ballot for the June 5, 2012

primary election to reduce and eliminate vested pension benefits of current employees.¹ The City refused to bargain over the measure prior to Council adoption on March 6th. This is per se bad faith bargaining. Because the City failed to bargain in good faith with the Union over the terms of the proposed charter amendment, its placement of Measure B² on the ballot is an unfair practice in violation of the MMBA, and applicable PERB regulations.

Sections of the Government Code and PERB Regulations Violated

4. By submitting Measure B to the voters without meeting and conferring in good faith, the City violated its duty to bargain under the following provisions of the MMBA and PERB regulations:

- A. Government Code, sections 3504.5, 3505, 3506.5(c) and 3507(e)(5)
- B. PERB Regulation: 32603(b), (c), (e) and (f) and City of San Jose Employer-Employee Resolution 39367.

The Union Seeks An Expedited Hearing for the Purpose of Expediting the Filing by PERB of a Petition for Writ Quo Warranto.

5. An action in quo warranto is a proper remedy by which to challenge the procedural regularity of a city charter amendment. (*The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra; International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694.) Accordingly, the Union requests either (1) that the Board instruct its agent to submit the record of the case to the Board itself for decision, and to expedite its decision

¹ A true and correct copy of City of San Jose Resolution No. 76158 adopted March 6, 2012 and authorizing the submission to the electors of its proposal to amend the charter as it pertains to pensions and benefits provided to current and future employees "and to place other limitations on pensions and benefits" is attached hereto as Exhibit 1.

² The Registrar of Voters for the County of Santa Clara has denominated the City's proposed charter amendment as Local Measure B on the June 5, 2012 ballot. All future references to Measure B thus refer to the proposed charter amendment adopted by the City of San Jose Resolution No. 76158.

in accordance with PERB Regulation 32147, or (2) that the Chief Administrative Law Judge or General Counsel expedite the scheduling of an administrative hearing and decision pursuant to PERB Regulations 32147 and 32215. The Union asks PERB to expedite its ruling in order to establish the predicate determination enabling PERB to seek leave from the Office of the Attorney General to sue in quo warranto to set aside the Measure B if adopted by the voters.

6. Directing expedited processing of this matter is warranted for several reasons. First, under the facts presented, the establishment of an unfair practice is likely to succeed since the provisions of Measure B were never bargained over by the parties prior to adoption by the City (see, *Santa Clara County Registered Nurses Professional Association, supra*; and pages 17-24 *infra*). Second, the City Council, aware that the provisions of Measure B are “untested,”³ potentially unconstitutional and thus an ongoing controversy of great importance, has already directed its legal counsel to initiate proceedings establishing the validity of the pension changes immediately upon certification of the election results.⁴ Third, the position of whether a California municipal employer may lawfully reduce current employee pension benefits as proposed in Measure B is a matter of statewide importance for collective bargaining parties. Lastly, obtaining leave to sue in quo warranto may be a time-consuming process. And a petition for a writ quo warranto may be permissive cross claim to the City contemplates action for declaratory relief upon passage of Measure B. Thus judicial economy and administrative efficiency requires

³ See p. 6 of March 5, 2012 Memorandum to Richard Doyle, City Attorney from Arthur A. Hartinger, et al, regarding “Proposed Charter Amendment – Sustainable Retirement Benefits and Compensation Act,” a true and correct copy of which is attached as Exhibit 2.

⁴ See Memorandum to Mayor and City Council from Councilmember Sam Liccardo dated March 6, 2012, a true and correct copy of which is attached as Exhibit 3. At the March 6th Council session, a majority of the Council adopted Councilmember Liccardo’s recommendation to “direct the City Attorney to file an action for declaratory relief in the trial court of competent jurisdiction . . . seeking a judicial determination of whether the City may adjust the compensation of current employees through additional retirement contributions or pay reductions [required under Measure B].”

the exercise of discretion by PERB to expedite processing of this charge. (Cf., *Riverside Unified School District* (1985) PERB Order No. Ad-152.) If the Board determines that it will benefit both parties and the Board itself to first receive a proposed decision of a PERB administrative law judge, then the Board should at least expedite the scheduling and presentation of the matter before the ALJ.

Pertinent Facts Underlying the Unfair Practice and the Request for An Expedited Hearing

7. The Union is an employee organization within the meaning of MMBA section 3501(a), a recognized employee organization within the meaning of MMBA section 3501(b), and an exclusive representative within the meaning of PERB Regulation 32016 (b) for a bargaining unit of fire fighters. The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a).

8. The Union and the City are parties to a Memorandum of Agreement (MOA) for the term of July 1, 2009 through June 30, 2013. This Agreement is evidenced by the preexisting provisions of the predecessor MOA in effect for the term of March 1, 2004 through June 30, 2009 combined with the executed agreements on discrete matters within the scope of representation.⁵

The Contractual Agreement to Bargain Retirement Benefits Reform

9. Under the terms of the MOA, and as a result of the exceptional circumstances provided by the recent national economic recession, the parties agreed to bargain in 2011 over pension and retiree health care benefits for current and future employees. That agreement is set forth in a "Side Letter Agreement" dated March 3, 2011 in Exhibit 4 and provides, in pertinent

⁵ These documents constituting the MOA are collectively attached hereto as Exhibit 4.

part that "[I]f the parties are at impasse and no agreement is reached, the parties shall submit the issues for determination in accordance with the applicable provisions under the Employer-Employee Relations Resolution No. 39367 and/or City Charter Section 1111."⁶

Section 23 of Resolution No. 39367 provides for mediation in the event of an impasse in bargaining, when interest arbitration does not apply. San Jose City Charter Section 1111 provides for binding interest arbitration of bargaining impasses between the Union and the City.

The City's Police and Fire Retirement Plan and the Changes to Benefits Under Proposed Measure B

10. Pursuant to the San Jose City Charter, the City Council is empowered to set benefits and establish a retirement plan for its employees. The City has established two pension plans, one for police officers and fire fighters, and another for all other City employees. (See San Jose Municipal Code §§3.16-3.52.) The City Charter also sets forth minimum benefits for certain members of the police and fire fighter pension plan.⁷ The plans are both defined benefit pension plans.⁸ The Charter does not reserve to the City the right to impair the pension plan benefits once established, nor does it provide that plan benefits are not vested contractual rights.

11. The Council further created Boards of Administration for each plan, with the power to determine eligibility for receipt of retirement benefits under the plans. In that role, the Board of Administration for the Police and Fire Plan ("Board") administers the retirement system and performs various functions related to the plan, including the calculation of annual

⁶ A true and correct copy of City of San Jose Employer-Employee Relations Resolution No. 39367 is attached hereto as Exhibit 5.

⁷ See City of San Jose City Charter section 1504 at http://www.sanjoseca.gov/clerk/Charter/Charter_article15.pdf.

⁸ See .g., San Jose Municipal Code §§3.36 et seq., the 1961 Police and Fire Retirement Plan at [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=template\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=template$fn=default.htm$3.0$vid=amlegal:sanjose_ca).

employer and employee contributions, the management and investment of the plan's funds and the distribution of pension benefits to retired police officers and fire fighters. Membership in the plan is compulsory and a condition of employment for City fire fighters. Retirement benefits under the plan are funded by contributions from both the pension plan's members and City, which contributions are in turn invested for the benefit of the plan members.⁹ Employee contributions are credited to a member's participation account for normal service costs.¹⁰ Employees contribute nothing towards prior service costs. In contrast, the City's contributions are credited to the Plan as a whole. When investments exceed the actuarially assumed investment growth rate, the City's unfunded actuarially accrued liability ("UAAL") for prior service costs is reduced. Moreover, when the funding ratio of the Plan's assets to liabilities exceeds 100%, the positive UAAL (or "over-funding of the Plan") serves as a credit in favor of the City by reducing its normal cost contributions.

12. As a result of declining national economy and consequential investment losses to the Plan in the period of 2007-2008, the Plan's funded ratio dropped, and the City's payment for prior service UAAL increased. This experience is consistent with every other public pension plan in California. But unlike other public sector plans, the San Jose Plan has an unusually short amortization period – only 16 years – as contrasted with most California public pension plans. This shorter amortization period guarantees greater increases in the annual UAAL contributions assigned to the City, thus increasing its pension contribution costs, since there is a shorter period of time within which the Board's actuary calculates contribution rates needed to achieve 100%

⁹ See, San Jose Municipal Code §§3.36.1500 et. seq.

¹⁰ The Board, through its actuary's valuation determines the annual amount of employee and City contributions that will be necessary to pay for the costs of current benefits (the normal cost) split on a 3/11ths to 8/11ths basis, as well as the annual costs of any unfunded liability (i.e., benefits that have already accrued, but for which the plan does not have sufficient assets to pay).

funding of liabilities. The exceptional rise in pension contribution costs, fomented by economic declines beyond the Board's control, created the background against which the parties agreed in March, 2011 to continue to bargain over retirement reform for employees.

13. If adopted, Measure B¹¹ would shift up to 50% of the costs of unfunded liabilities from the City to employees and it would radically reduce, change or eliminate existing retirement benefits enjoyed by current employees and would dramatically reduce retirement benefits for future employees in pertinent part, as follows:

A. Contributions. The Plan requires the City and employees to make contributions towards the normal cost of the retirement plan in a ratio of 8 (City) to 3 (employee). The City also makes contributions towards the unfunded liabilities that result from insufficient plan assets to pay projected retirement costs. Under Measure B, Section 1506-A(b), beginning July 23, 2013, employees would be required to make additional contributions to pay the City's unfunded liabilities. Employees would contribute from 4% of pay, up to a maximum of 16% per year, but no more than half the yearly cost to pay unfunded liabilities. There is no provision for a reduction in employee contributions in the event that unfunded liabilities decline to less than current amounts. If a court determines that this provision of Measure B¹² is unenforceable, equivalent monetary "savings" would be imposed on employees by "pay reductions".

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¹¹ The text of Measure B amending the City Charter to add Article XV-A, is set forth in Exhibit A to Exhibit 1 attached hereto.

¹² See Proposed Charter Section 1514-A, set forth in Exhibit A, page 16 to Exhibit 1.

B. Alternative Plan. Measure B requires the City Council to adopt a Voluntary Election Program ("VEP"), subject to IRS approval.¹³ Under the VEP, employees who "opt in" would not be required to make the additional contributions to pay the City's unfunded liabilities. But of course, the VEP provides vastly inferior benefits to those provided to current fire fighters. If the VEP has not been implemented, or employees do not elect to participate, employees will be required to contribute up to a maximum of 16% of pay per year to pay the City's unfunded liabilities.

C. New Employees. Measure B requires the City to adopt a retirement plan for new fire fighters that could include social security, a defined benefit plan and/or a defined contribution plan, provided that the City's contribution is capped at 9% of some unidentified figure.

D. Disability Retirement. Measure B limits disability retirements for current and future employees to instances where the fire fighter is unable to perform any other job within the Fire Department, whether such job is available or not. Thus, if a disabled fire fighter is capable of performing secretarial duties in the Fire Department, but no such positions are available, the fire fighter is ineligible for disability retirement benefits.

E. Measure B authorizes the Council to suspend cost of living adjustments paid to current and future retirees for up to five years if the Council adopts a resolution declaring a fiscal and service level emergency based on unidentified criteria.

¹³ The "implementation of the VEP is contingent on IRS approval" but that approval, as the City concedes is uncertain at best. In a memorandum dated June 23, 2011, from Deputy City Manager Alex Gurza to Mayor and City Council, (http://www.sanjoseca.gov/clerk/Agenda/20110624/20110624_0301att3.pdf) the City acknowledged that "the IRS has not approved any opt in plans since at least 2005 and that there are currently 22 such requests pending with the IRS. Orange County has had their retirement opt in program for current employees on hold waiting on IRS approval." Accordingly, Measure B is revealed for what it is: a means to shift the cost of unfunded liabilities from the City to the employees.

F. Supplemental Retirement Benefits. Measure B discontinues the Supplemental Retiree Benefit Reserve in the current pension plan, which requires the allocation of a portion of excess plan investment income to fund supplemental benefits for retirees.

G. Retiree Health Care Benefits. Measure B requires fire fighters to assume 50% of the cost of unfunded liabilities for all retiree health care benefits.

The City's Campaign to Misrepresent the Future Cost of Pension Contributions

14. Notwithstanding the 2011 agreement to bargain over retirement benefits for current and future employees, San Jose City Mayor Chuck Reed in February 2011 began a campaign to have the City Council declare a fiscal emergency to justify making unilateral changes to pension benefits for current employees and retirees. Concurrently, the Mayor and other Councilmembers proposed consideration of a charter amendment in the form of a ballot measure that would unilaterally reduce retirement benefits of all City employees, including those represented by the Union. The Mayor commenced a frenzied political and media campaign warning of an impending fiscal disaster for the City as a result of projections for escalating pension costs. The Mayor and his staff repeatedly asserted, including in official City documents put forward as part of the City's bargaining position with the Union, that by fiscal year 2015-2016, the City's total retirement contribution costs could reach \$650 million per year, up from a fiscal year 2010-2011 level of \$245 million. This figure was used more than three dozen times, including in press releases and in interviews in the New York Times and Vanity Fair magazine. For example, on April 13, 2011, San Jose Mayor Chuck Reed and Vice Mayor Madison Nguyen issued a press release announcing that "San Jose's Retirement Director has projected that

[pension] costs could rise to \$650 million per year by fiscal year 2015-2016 . . .”¹⁴ This statement was knowingly misleading.¹⁵ On May 13, 2011, the City published the Mayor’s Memorandum Re: Fiscal Reforms wherein Reed asserted the City’s pension costs were projected to grow to \$650 million annually by 2016.¹⁶ Again, there was no basis for this assertion.

15. On October 17, 2011, the City Council convened a “study session,” for the purpose of discussing the Union’s view that the \$650 million projection of future pension contribution costs was wildly unfounded. The Union presented actuary Tom Lowman to the Council. Mr. Lowman advised the Council that in his expert opinion, future City pension contribution costs would not rise to \$650 million or even \$431.5 million by Fiscal Year 2015-2016. His opinion was based, among other things, upon (1) the actual growth in assets above the assumed annual rate in Fiscal Year 2010-2011 and (2) the 10% salary reductions negotiated with the Union¹⁷ and other labor groups, at variance with an assumed payroll growth rate of 4.25% annually. He advised that based on his preliminary review, at present, City pension contribution costs for Fiscal Year 2015-2016 would rise to a figure closer to \$300 million. In fact, in November and December, 2011, the independent actuary to the Board determined that total City pension contribution costs would be closer to \$330 million. Because the City customarily pays its full year’s contribution in one payment on July 1st, at the beginning of the fiscal year, this figure may drop by \$15-20 million. Moreover, the overall UAAL may decline, and with it the City’s pension contribution costs, if the economic recovery now underway increases assets more than the assumed growth rate, or if the assumed increases in wage growth does not occur.

¹⁴ See Press Release: Mayor Reed and Vice Mayor Nguyen to Discuss Impacts of Pension Costs on San Jose Budget (4/13/12): <http://www.sanjoseca.gov/mayor/news/releases/11April/ReedNguyenDiscussPensionCosts.pdf>.

¹⁵ See discussion in ¶16, *infra*.

¹⁶ See Memo:Fiscal Reforms (5/13/12, see page 5):

http://www.sanjosecagov/mayor/news/memos/11May/FiscalReforms_05132011.pdf.

¹⁷ See 2011 “Wages” agreement executed March 3, 2011 attached as part of Exhibit 4 hereto.

16. The extensive use by the Mayor and his staff of the \$650 million figure during the bargaining over retirement benefits between the parties is set forth in detail in an ethics complaint¹⁸ brought against the Mayor on or about February 9, 2012 and in a complaint filed with the Securities and Exchange Commission¹⁹ on or about February 27, 2012.

17. In 2011 and 2012, various City management representatives repeatedly issued dire warnings about projected pension contribution costs. They pushed the Council for a declaration of towards declaring a so-called fiscal state of emergency. They lobbied publicly for a ballot measure to reduce and eliminate pension benefits, even though the \$650 million dollar figure projected cost figure was inaccurate by more than \$330 million. The City's Director of Retirement Services, Russell Crosby, the only source for the \$650 million projection of costs, expressly disavowed the \$650 million figure and told the Mayor and the City that it should not be relied upon. Director Crosby's disavowal was made public on a February 8, 2012 broadcast of an investigative report on Bay Area NBC-TV Channel 11, a San Jose television station. The Channel 11 broadcast established that the City's overstatements and inaccurate pension contribution cost projections were deliberate and designed to support both the Mayor's declaration for fiscal emergency and his drive towards achieving a ballot measure to reduce and eliminate pension benefits. In the February 8th broadcast, Mayor Reed acknowledged that the source for the \$650 million figure was Crosby. In a same broadcast, however, Crosby stated that the \$650 million estimation: "Was a number off the top of my head." He also stated that: "The Mayor was told not to use that number . . . that the number was \$400 [million dollars]." The City never had an actuarially sound basis for representing a \$650 million pension contribution cost projection by fiscal year 2015-2016. In a March 22, 2012 memorandum to the City Council,

¹⁸ A true and correct copy of the ethics complaint is attached hereto as Exhibit 6.

¹⁹ A true and correct copy of the SEC complaint is attached hereto as Exhibit 7.

City Manager Debra Figone confirmed that the \$650 million cost figure was not based on a competent expert actuarial analysis – rather, it was an unsupported estimate from Crosby.

18. By continuing to communicate the false \$650 million projection, the City's intent was to organize public media and political sentiment to support the City's plan to declare a fiscal emergency and place before the voters a ballot measure radically changing retirement and other post-employment benefits for Union represented firefighters, among other City employees. At all times that the \$650 million representation was made, however, the City knew that it was false and without any reasonable actuarial basis such that the City "knowingly provided [the Union] with inaccurate information regarding the financial resources of the public employer . . ." within the meaning of MMBA Section 3506.5(c) in violation of MMBA 3505 and PERB Regulation 322603(c).

19. On or about December 1, 2011, the independent actuary for the City's two retirement plans issued an updated report regarding projections for prospective City retirement contribution costs. The report disclosed that the City's retirement contribution costs would be far less than previously estimated and approximately \$320 million less than the Mayor had been broadcasting as justification for both a proposed declaration of fiscal emergency and a ballot proposition unilaterally reducing pension benefits. The independent actuary's report showed that, just for the Police and Fire Retirement Plan, the City's cost and contributions for fiscal year 2012-2013 would be approximately \$55 million less than previously budgeted.²⁰

²⁰ More importantly, in reports dated February 8 and 21, 2012, the independent plan actuaries issued 5-year budget projections for the Federated and the Police and Fire Retirement plans. Combined the projected cost of City contributions for pension and retiree health benefits for Fiscal Year 2015-2016 totaled \$322.0 million dollars. Subtracting the projected retiree health care contributions reduced the Fiscal Year 2015-2016 City pension contribution cost projection to \$251.6 million – almost \$400 million below Reed's public estimate.

20. Ever intent on misrepresenting the future costs of current benefits, however, as recently as February 24, 2012 the Mayor asserted that the City's pension liability could reach \$650 million by fiscal year 2015-2016.²¹

21. On February 28, 2012, five California State Assembly members and two State Senators requested that California's legislature's Joint Legislative Audit Committee conduct an audit into the City's general finances and current and future pension obligations. In a statement released to the press, these legislators asked that: "The audit should focus on all projections used by the City and/or its elected officials that include, but may not be limited to, \$400 million, \$431 million, \$570 million, and \$650 million [in projected contribution costs]." On March 7, 2012, the Joint Legislative Audit Committee ordered a State audit to determine, inter alia, whether the Mayor, City Council, or other City officials engaged in any wrongdoing or illegal violations in referencing the false \$650 million pension costs contribution projection for fiscal year 2015-2016. The Committee directed a State order to give the audit priority status.

The City's Bad Faith Bargaining over the Ballot Measure Amending the Charter to Alter Retirement Benefits for Current Employees

22. In coordination with the San Jose Police Officers Association (SJPOA), the exclusive bargaining representative within the meaning of MMBA section 3501(b) for a bargaining unit of police officers, the Union and the City commenced joint bargaining over retirement benefits for current and future fire fighters and police officers in June 2011. At that first meeting, the parties executed a "Pledge of Cooperation and Agreement upon a Framework

²¹ KCBS 740 AM Radio News Report CHUCK REED: "It could get into the ballpark of \$650 million which would be a disaster for the City of San Jose and that's something I think that the public has a right to know." See page 8 of attachment to SEC complaint, attached hereto as Exhibit 7.

for Retirement and Related Ballot Measure Negotiations”.²² The pertinent provisions of that “Pledge” are:

[¶]2. The parties agree to negotiate concurrently on the issues of retirement reform and related ballot measure(s). Negotiation of retirement reform shall include pension and retiree healthcare benefits for current and future employees, including but not limited to healthcare benefits; the Supplemental Retiree Benefit Reserve (SRBR); an opt-in program in which current employees could voluntarily choose to opt-out of the current level of pension benefits into a lower level of benefits; and other terms as identified through the negotiations.

* * *

[¶]7. The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to the procedures outlined in the Employer-Employee Relations Resolution No. 39367. In the event of impasse, the POA and IAFF, Local 230 will participate in the impasse procedures collectively. If the parties proceed to binding interest arbitration, in accordance with the applicable provisions under Charter Section 1111, it is understood that the POA and Local 230 will participate in these proceedings separately. Charter Section 1111 shall not apply to bargaining over ballot measures.

[¶]8. The parties agree that the Council may, pursuant to its constitutional authority, place charter amendments on the ballot regarding retirement at the conclusion of these negotiations and mediation.

[¶]9. It is understood that, by participating in these negotiations, neither party waives any legal rights, including the Unions’ or an employee’s rights to assert that certain benefits are vested.

23. At the first bargaining session between the three parties on June 20, 2011, the City bargaining team, led by Deputy City Manager Alex Gurza gave the Union a copy of the Mayor’s

²² A true and correct copy of this document is attached hereto as Exhibit 8.

June 14, 2011 Budget Message.²³ Gurza confirmed in writing on June 21st, that the Mayor's Budget Message was "*the City's only actual proposal for a ballot measure*" (emphasis in the original).²⁴ Of course, the Mayor's Budget message represented that the City's pension costs could increase annually to approximately \$650 million by 2016²⁵ – a baseless assertion that the City never retracted during bargaining.

24. On July 5, 2011, the City presented its first proposal²⁶ setting forth language for consideration as an amendment to the Charter, although the proposal did not identify what portions of the Charter were proposed to be amended. The City subsequently modified this proposal on September 9, October 5, 20 and 27, 2011.

25. During the period between July and October 2011, the parties met and conferred. The Union and the SJPOA put forth various proposals. Each proposal was consistent with paragraph 9 in the "Pledge of Cooperation"²⁷ and the Union's position that any pension benefit reforms had to conform to the legal strictures under the vested rights doctrine²⁸ such that any reductions or modifications to current benefit provisions could only be achieved by either accompanying offsetting benefit improvements²⁹ or through individual voluntary non-punitive waivers of current pension plan benefits, e.g., truly voluntary "opt-ins" to a 2nd tier benefit plan.

²³ A true and correct copy of the Mayor's June 14, 2011 Budget Message is attached hereto as Exhibit 9.

²⁴ A true and correct copy of Gurza's June 21, 2011 letter to Union President Robert Sapient confirming the City's opening ballot measure proposal is attached hereto as Exhibit 10.

²⁵ See Exhibit 9 at page 5 under section entitled, "BACKGROUND".

²⁶ A true and correct copy of the City's July 5, 2011 proposal is attached as Exhibit 11.

²⁷ See Exhibit 8 attached hereto.

²⁸ The state Constitution protects the vested retirement rights of public employees by prohibiting laws that impair the obligation of contracts or deprive employees of their property rights without due process of law. (Cal. Const., art. I, §§ 7, 9.; see also, *Legislature v. Eu* (1991) 54 Cal.3d 492, 528; *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120; *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863-864; *Miller v. State of California* (1977) 18 Cal.3d 808-814-817; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131; and *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853.)

²⁹ See *Betts v. Board of Administration*, supra, 21 Cal.3d at p.864: "alterations of employees' pension rights must bear some material relation to the theory of a pension system, and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages," quoting *Allen v. City of Long Beach*, supra, 45 Cal.2d at p. 131, italics added.

For example, on September 27, 2011, the Union and the SJPOA proposed, in writing, a three-tier retirement model that maintained the status quo for active employees but created a second tier for new hires and opt-ins with reduced retirement benefits under the California Public Employees Retirement System (CalPERS).

26. The parties failed to reach agreement on either pension benefits or a potential proposed charter amendment by October 31, 2011. In compliance with paragraph 7 of the "Pledge of Cooperation," the parties entered into mediation, with the assistance of the California State Mediation Conciliation Service. The Union and the SJPOA put forward new proposals on November 11 and 18, 2011 significantly amending their prior proposals.

27. On November 22, 2011, the City revised its ballot measure proposal. It was subject to a new condition: if rejected by the Union, the City Council would determine on December 6, 2011 whether to authorize the November 22nd proposal as a charter amendment to be placed on the ballot in a March 2012 special election. The City's November 22nd proposal was transmitted as an enclosure to a letter of that date from Gurza to Union President Sapien and SJPOA President George Beattie.³⁰ Like all prior charter amendment proposals from the City, the November 22nd proposal does not set forth what provisions of the charter it would amend by deletion or addition.

28. On December 6, 2011, the City Council adopted Resolution No. 76087³¹ calling a special municipal election for March 6, 2012 as communicated by Gurza's November 22nd letter to Union President Sapien. Resolution No. 76087 authorizes the submission to the electorate of a

³⁰ A true and correct copy of Gurza's November 22, 2012 letter is attached hereto as Exhibit 12.

³¹ A true and correct copy of the Synopsis of the December 6, 2011 Council meeting adopting Resolution No. 76087 is attached hereto as Exhibit 13. Resolution No. 76067 was appended to a December 5, 2011 Memorandum from Mayor Chuck Reed to the Council, a true and correct copy of which is attached hereto as Exhibit 14.

different measure than the November 22nd City proposal. At this same council meeting, the Mayor deferred his proposal to have the City Council declare a fiscal state of emergency.

29. Concurrent with its action on December 6, 2011 to adopt Resolution No. 76087, the City Council directed City staff to engage in after-the-fact or fait accompli mediation with the Union and other labor organizations, if requested.

30. The Union and the SJPOA subsequently met with the City on December 22, 2011 and on January 9 and 12, 2012, but the City refused to agree to bargain, adopting the position that the parties were at impasse and therefore not obligated to further bargain about the ballot measure.

31. Renewed mediation efforts followed on January 17, 18 and February 6 and 10, 2012 with the assistance of an outside third party mediator, but were unsuccessful.

32. At the end of the mediation session on February 10, 2012, Gurza presented the Union and the SJPOA with a new revised City proposed ballot measure.³² It contained different terms and provisions from those in the proposed measure adopted by the Council on December 6, 2011 in Resolution No. 76087. Gurza presented the February 10, 2012 proposed measure under the following condition: The Union could accept the new February 10th ballot measure, but if the Union rejected it, the City would go forward on the June 5, 2012 ballot *with the ballot measure adopted by Resolution No. 76067 of the City Council on December 6, 2011*. On its face, the City's February 10th proposed charter amendment bears that date of February 8, 2012. It contains a significant revision from all earlier City proposals because it changes the effective

³² A true and correct copy of the City's February 10, 2012 proposal is attached hereto as Exhibit 15.

date employees will be required to make additional contributions to pay the City's unfunded liabilities from June 24, 2012 to June 23, 2013.³³

33. The need for a measure on the June 2012 election ballot was obviated by the new February 10, 2012 proposal because the effective date for cost-shifting of UAAL pension contributions from the City to employees was delayed one year from 2012 to 2013. Yet, on February 21, 2012, Gurza wrote Union President Sapien and told him that the City's revised proposed charter measure of February 10th "would be considered by the City Council at the March 6, 2012, Council Meeting for a June 2012 ballot."³⁴ This was a major change to the offer as communicated in mediation on February 10th, when Gurza stated that if rejected by the Union, the Council would submit to the voters the measure authorized by the adoption of Resolution No 76087 on December 6, 2011.

34. On February 28, 2012 I wrote to Gurza requesting the City to meet and confer over its newly framed offers of February 10th and 21st, especially since it was now unclear what *possible* ballot measure would be adopted by the Council and since the Union had not been afforded the opportunity to bargain over the provisions of the measure proposed on February 10th and 21st.³⁵ My letter notes that the City's February 10, 2012 revised proposal for a ballot measure sets forth significant changes from the ballot measure approved for placement on the ballot by the City Council on December 6, 2011. For example, the February 10th proposal reduces the annual increase in employee contributions for the City's unfunded pension liability from 5% per year, to 4% per year. Moreover, my letter notes that the City Manager conceded that the City's February 21st proposal contained "many significant changes and movements from

³³ Compare Exhibit 15, Section 6(c) with Exhibit 14, Section 6(c).

³⁴ A true and correct copy of Gurza's February 21, 2012 letter is attached hereto as Exhibit 16.

³⁵ A true and correct copy of my February 28, 2012 letter to Gurza is attached hereto as Exhibit 17.

earlier drafts.” Hence, I wrote that the Union “had no opportunity to bargain about this new ballot language.”

35. On March 2³⁶ and 3,³⁷ 2012 Union President Robert Sapien sent Gurza a new joint Union/SJPOA proposal to the City, inclusive of alternative ballot language, which would guarantee additional tens of millions of dollars in savings to the City annually. The March 3rd letter proposed continued bargaining “from 10:00 a.m. March 3, 2012 through 11:59 p.m. on March 9, 2012.”

36. On March 5, 2012, by letter from City Counsel Jonathan V. Holtzman, the City rejected the joint Union/SJPOA proposal, without meeting or bargaining.³⁸

37. On March 6, 2012, the City Council adopted Resolution No. 76158, placing its new February 21, 2012 proposed pension reform charter reform ballot measure on the June 5, 2012 election ballot.³⁹ The adopted measure, like the proposal distributed by the City to the Union at the final mediation session of February 10th, reflects a date of February 8, 2012, not February 21, 2012. Because the document is dated February 8, it is clear that the City had this proposal before it presented the proposal to the Union at the last moment in mediation on February 10, 2012 with the strict admonition and condition that rejection of the proposal meant the Council would proceed with the charter amendment previously adopted by Resolution No. 76087 on December 6, 2011.

38. The action taken by the City Council on March 6, 2012 adopting Resolution No. 76158 was taken unilaterally and without providing the Union with notice and opportunity to

³⁶ A true and correct copy of the March 2, 2012 letter is attached hereto as Exhibit 18

³⁷ A true and correct copy of the March 3, 2012 letter is attached hereto as Exhibit 19.

³⁸ A true and correct copy of the March 5th letter is attached hereto as Exhibit 20.

³⁹ See Exhibit 8 attached hereto.

“meet and confer” . . . before [the City] proposed charter amendments which affect matters within their scope of representation.” (*People ex rel Seal Beach Police Officers’ Assn. v. City of Seal Beach*, *supra*, 36 Cal.3d at 602.)

The Law

39. MMBA section 3505 requires public agencies to meet and confer in good faith with employee organizations regarding matters within the scope of representation. In determining whether a party has violated MMBA sections 3504.5 and 3505 and PERB Regulation 35603 (b), (c) or (e), PERB utilizes either the “per se” or “totality of the conduct” test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)⁴⁰

40. Unilateral changes are considered “per se” violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties’ written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members’ terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

41. The rule is applicable when a party seeks to change a matter within the scope of representation through the initiative process. Prior to placing the matter before the voters, the

⁴⁰ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (See, *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

City must first satisfy its obligation to bargain. (*The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra.*) The City's ballot measure changing the terms of promised retirement benefits to current employees and future employees is a matter within the scope of representation. (*County of Sacramento I; County of Sacramento II; County of Sacramento III, Madera Unified School District* (2007) PERB Decision No 1907.) Accordingly, the City had a duty to meet and confer over the terms of Measure B prior to submitting the measure for the June 2012 ballot.

Conclusion

42. The changes to firefighter pension contributions and benefits contained in Measure B go beyond mere clarification and constitute substantive changes to pension rights and benefits enjoyed currently by employees, as well as radically reducing benefits for future firefighters. Accordingly, and as is recognized on the face of Resolution No. 76158, Measure B seeks to change the pension plan benefits now in place under the San Jose Municipal Code.

43. The Council's placement of Measure B on the June 5, 2012 election ballot was done without giving the Union an opportunity to bargain over the provisions of the proposed charter amendment. The Board has held that the obligation to meet and negotiate in good faith is one that must be fulfilled before implementing a change to matters within the scope of representation. (*Calexico Unified Schl. Dist.* (1983) PERB Decision No. 357.) Indeed, MMBA Section 3505 provides, in relevant part:

'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to

reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses for specific procedures for such resolution that are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent. [Emphasis added.]

Thus, absent a waiver by the exclusive representative, an employer violates its duty to meet and confer in good faith when it makes a unilateral change to a matter within the scope prior to the completion of bargaining. (*Omnitrans* (2009) PERB Decision No. 2001-M.) This duty is satisfied if the parties either reach agreement or bargain to impasse or participate in any applicable impasse procedures.

44. The City met with the Union on several occasions to bargain over both contractual provisions for retirement benefits and the charter amendment measure *but never bargained over the provisions of Measure B*. There is no evidence that these sessions suffered from a lack of interest by the Union. But the City refused to bargain over the provisions of Measure B (1) after it told the Union on February 10th that rejection of the February 10th proposal, would lead to implementation of the City Resolution No. 76087 adopted December 6, 2011 and again (2) after it later declared on February 21st that the charter amendment measure adopted by Resolution No. 76087 would be displaced by adoption of Resolution No. 76158 – i.e., placing the language of its February 10th proposed measure on the June ballot. The City's refusal to bargain or further mediate pursuant to City Resolution No. 39367 before adopting Resolution No. 76158 is bad faith bargaining.

45. Measure B is not a mere isolated or de minimus breach of terms and conditions of employment, but a change in policy of immense overall effect and continued impact on bargaining unit terms and conditions of employment. Measure B will change the level of

benefits and cost paid by firefighters for those benefits. Such a change will have an ongoing and generalized effect on the terms and conditions of employment.

46. Because all four elements of the “per se” violations criteria are met, the City breached its duty to meet and confer in good faith when it failed to bargain over its proposal of February 21, 2012 to agreement or impasse, inclusive of exhaustion of the mediation procedures under City Resolution No. 39367, prior to placing Measure B on the ballot. Moreover, the change in effective application of the cost shifting provisions in Measure B from June 24, 2012 to June 23, 2013 compared with previously adopted Resolution No. 76087, means the City Council had no imminent need to adopt Resolution No. 76158 on March 9, 2012 and proceed to a June 5, 2012 election. Thus, the City is not relieved of its duty to bargain to agreement or impasse, inclusive of impasse resolution procedures, in the absence of an imminent need to act. (*Cf., Compton Community College Dist. (1989) PERB Decision No. 720.*) This city was not faced with an imminent need to act prior to March 9, 2012 and thus it was not privileged under *Compton* to place Measure B on the ballot prior to the completion of bargaining.

47. The foregoing facts establish that Respondent City committed unfair labor practices as follows:

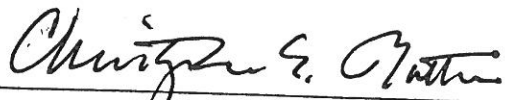
A. By knowingly providing the Union with inaccurate information regarding the projected pension contribution costs of the City and by bargaining from a false premise that the City’s pension contribution costs would escalate to \$650 million by fiscal year 2015-2016 when the City knew that such a projection was inaccurate and not factually based.

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B. By adopting Resolution No. 76158 on March 6, 2012, and placing before the voters on June 5, 2012 a ballot measure amending the City Charter per the City's offer of February 21, 2012 without bargaining or engaging in mediation with the Union under the City's Employer-Employee Resolution No. 39367 or other impasse procedures with the Union.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed on this 4th day of June 2012 at San Jose, California.



Christopher E. Platten

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PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am a resident of or employed in the County of Santa Clara, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Wylie, McBride, Platten & Renner, 2125 Canoas Garden Ave, Suite 120, San Jose, CA 95125.

I am readily familiar with the ordinary practice of the business of collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

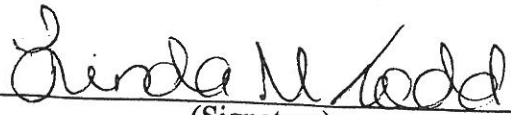
On June 4, 2012, I served the **UNFAIR PRACTICE CHARGE (with accompanying exhibits) and DECLARATION OF CHRISTOPHER E. PLATTEN IN SUPPORT OF UNFAIR PRACTICE CHARGE AND REQUEST FOR EXPEDITED HEARING** on the parties listed below by placing a true copy thereof enclosed in a sealed envelope for collection and mailing in the United States Postal Service following ordinary business practices at San Jose, California addressed as follows:

**Alex Gurza, Deputy City Manager
City of San Jose
200 East Santa Clara Street
San Jose, CA 95113**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on **June 4, 2012** at San Jose, California.

LINDA M. TODD

(Type or print name)



(Signature)

RECEIVED

JUN 11 2012

CLERK OF SUPERIOR COURT
SANTA CLARA COUNTY